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Right to Know Advisory Committee
Public Records Exceptions Subcommittee
September 9, 2009
(Draft) Meeting Summary

Present:
Shenna Bellows, Chair
Linda Pistner
Chris Spruce

Absent:
Suzanne Goucher
Harry Pringle

Staff:
Peggy Reinsch
Colleen McCarthy Reid

Subcommittee Chair Shenna Bellows convened the Subcommittee and provided an overview of the planned agenda.

Existing Public Records Exceptions – Title 12/Marine Resources

The subcommittee reviewed three exceptions in the marine resources area: Title 12, section 6173, subsection 1 relating to marine resources statistics; Title 12, section 6445 relating to logbooks for lobster harvesters; and Title 12, section 6749-S, subsection 1 relating to logbooks for sea urchin buyers and processors. Under the provisions, statistical aggregate information related to landings is publicly disclosed if the information does not identify any person or vessel. David Etnier, Deputy Commission of the Department of Marine Resources, explained the rationale for keeping the identity of specific persons for business and proprietary reasons. Mr. Etnier also noted that while some information may be kept confidential for a certain area because information cannot be aggregated without identifying a person, the department routinely works with requesters for information to combine fisheries or geographic areas for the purposes of releasing aggregate data and marine resources statistics. Further, Mr. Etnier explained the confidentiality provision was important in securing agreement from the industry to requirements to report data and other business information to the department.

The subcommittee voted 2-1 to accept the exceptions without change (Chart #19; #21.1 and #22.1); Ms. Bellows was opposed to the motion because, in her opinion, the exceptions are overbroad in protecting the release of information to the public about a certain fishery or landings.

The subcommittee also reviewed the exception in Title 12, section 6455, subsection 1-A related to market studies and promotional plans for the Lobster Promotion Council. The exception permits the information to be kept confidential by a majority vote of the council members; information related to the market studies and promotional plans is disclosed to the Legislature. Mr. Spruce noted that the provision as drafted is not consistent with other exceptions as the subcommittee's position has been that the presumption is that records are public, but for certain specified exceptions. Mr. Etnier told the subcommittee that proposed legislation may be coming forward next session addressing the statute governing the Lobster Promotion Council. The subcommittee voted unanimously to amend the exception language to be consistent with previously approved exceptions (chart #22); staff will prepare a draft proposal for subcommittee review.

Existing Public Records Exceptions-Title 10 provisions

The subcommittee reviewed 2 provisions in Title 10: Title 10, section 945-J relating to the Maine International Trade Center and Title 10, section 975-A relating to the Finance Authority of Maine.

Last year, the subcommittee has discussed amending the Title 10, section 945-J exception but did not approve draft language. The subcommittee reviewed draft language prepared by staff that makes clear the policy that records are public but for certain records designated confidential. The draft allows proprietary information submitted to the Trade Center to be designated as confidential and protects that information if the Trade Center determines the information is proprietary and, if disclosed, would impair the competitive position of the trade center or the person submitting the information. Mr. Spruce stated that the draft reflects the standard being developed by the subcommittee which makes clear that records are public but that, if appropriate, certain information is designated confidential. Ms. Bellows and Ms. Pistner agreed. The subcommittee voted unanimously to amend the exception as reflected in the draft (Chart #2).

The subcommittee tabled its review of Title 10, section 975-A (Chart # 3) because it relates to the overall issue of the development of standard language to address information provided to state agencies in applications for government funding and technical assistance. See discussion later in summary.

Existing Public Records Exceptions-Title 12 provisions/Conservation and Forestry

The subcommittee reviewed 4 exceptions in Title 12 relating to conservation and forestry laws: Title 12, section 549-B, subsection 5 relating to water well information; Title 12, section 550-B, subsection 6 relating to mining permits on state lands; Title 12, section 8669, subsection B relating to forest policy experimental areas; and Title 12, section 8884, subsection 3 relating to volume information reports from landowners and wood processors.

Title 12, section 549-B, subsection 5 relating to water well information. The subcommittee received an email from Bob Marvinney, State Geologist, explaining the State's experience with this exception and requests for information. Ms. Bellows stated her belief that water is a resource for the public good and information about the resource should not be protected from disclosure even if the information is specific to a certain well or a well drilling business. As drafted, the provision exempts water well records from public disclosure although the records may be provided to federal and state agencies and municipalities. Mr. Spruce wondered whether the information could be provided without identifying the well driller or otherwise provided in the aggregate to the public. Ms. Bellows reiterated her belief that even individually identifying information should be disclosed given the nature of the resource. Ms. Pistner suggested asking for input from the Department of Conservation, Maine Geological Survey, on their position on the disclosure of aggregate statistical information to the public. The subcommittee voted unanimously to table the exception pending additional information from the agency. (Chart # 12.2)

Title 12, section 550-B, subsection 6 relating to mining permits on state lands. The subcommittee also had information from Bob Marvinney on this exception by email. Mr. Spruce noted that the exception keeps information related to mining permits confidential during the lease period. Ms. Bellows stated her belief that this information should be made public as a matter of principle since it involves mining on State-owned lands, but noted that such a proposal would likely cause

controversy. Given Ms. Bellow's comment, Mr. Spruce wondered whether the issue might be appropriate to refer to the Legislative policy committee. Staff noted that policy committees most often need a specific proposal to consider rather than referral of a general issue. Mr. Spruce then suggested that the subcommittee get more information about the process for granting mining permits at the next meeting. The subcommittee voted unanimously to table the exception pending additional information from the agency. (Chart # 12)

Title 12, section 8669, subsection B relating to forest policy experimental areas. Mr. Spruce noted that the language of the exception is not consistent with other provisions and stated that he would approve the exception if the language were amended. Staff noted that the law as currently drafted would limit the number of experimental areas for cutting to 6 and that information provided in 2008 indicated there were no agreements in place at that time. The subcommittee voted 2-1 to amend the exception; staff will prepare draft language for review. Ms. Bellows was opposed because of her concern that information related to public lands should not be protected from public disclosure; she would remove the exception. (Chart # 25)

Title 12, section 8884, subsection 3 relating to volume information reports from landowners and wood processors. Ms. Pistner explained that she was okay with this exception as the law as currently drafted provides for the release of aggregate data. Mr. Spruce agreed. The subcommittee voted 2-1 to accept the provision without change; Ms. Bellows was opposed. (Chart # 27)

Existing Public Records Exceptions-Judicial Branch related to jurors

The subcommittee reviewed 3 exceptions in Title 14: Title 14, section 1254-A, subsection 7 relating to the names of prospective jurors and contents of juror questionnaire forms; Title 14, section 1254-A, subsection 8 relating to names of jury pool; and Title 14, section 1254-B relating to juror selection records and information. Ms. Bellows stated her belief that this information should be confidential given the privacy and safety concerns and noted the court has some discretion to release certain information as the law is currently drafted. Mr. Spruce agreed that release of the names of jurors could jeopardize their safety. Ms. Pistner suggested that the statute itself might raise constitutional issues given the separation of powers between the Judicial and Legislative branches. The subcommittee voted unanimously to accept the provisions (Chart # 32, Chart # 33 and Chart # 34) without change (Chart # 32, Chart # 33 and Chart # 34), but also will invite comments from the full Advisory Committee and the Judicial branch on whether juror names after trial is concluded should continue to be protected from disclosure.

Existing Public Records Exceptions- Title 19-A

The subcommittee reviewed the exception in Title 19-A, section 4013, subsection 4 (Chart # 69) relating to the Domestic Homicide Review Panel. The provision keeps confidential the proceedings and records of the review panel although the conclusions of the panel are public information. Ms. Bellows raised her concern that the language is too broad and suggested that the exception be narrowed in some manner. Ms. Pistner explained that this is a standing panel that reviews deaths of persons killed by family or household members and makes systemic recommendations. The proceedings and files are confidential and often there are specific confidentiality provisions in other statutes that protect the release of the information. Mr. Spruce wondered how the exception could be narrowed and what other information beside the panel's conclusions could be made public. Mr. Spruce also noted that some individuals may not be willing to provide information to the panel without confidentiality protection. Ms. Bellows thought it would be useful to have other perspectives on this issue, perhaps from other members

of the Advisory Committee. Ms. Bellows stated her intention to protect personally identifying information but that otherwise the presumption should be that information is made public. Mr. Spruce reminded the subcommittee that there are other similar panels that review maternal and child deaths and elder abuse deaths and that the provisions should be consistent in their treatment of confidential information. Ms. Bellows agreed. The subcommittee deferred further consideration of this exception; staff will provide examples of reports from the panel and information on similar statutory provisions.

Review of Criminal History Record Information Act

The subcommittee tabled review of Title 16, chapter 3, subchapter 8: Criminal History Record Information Act and Title 16, section 614, subsection 1-A. Staff is working on a redraft of the provisions with the assistance of Charles Leadbetter, Special Assistant Attorney General. Ms. Bellows raised an additional issue on behalf of the Maine Civil Liberties Union who has had previous discussions with the Department of Public Safety about amending the law to require notice to an individual if criminal history record information is used as a basis for the denial of employment or credit. Staff suggested that this issue could be incorporated into the draft for discussion purposes. Ms. Bellows will provide follow up information.

Review of Statutory Exceptions Related to Applicants for Governmental Assistance and Funding

The subcommittee has been asked by the Advisory Committee to review the issue of appropriate statutory standard language for protected information provided to state agencies by applicants for State funding or technical assistance. The subcommittee reviewed the statutory examples provided by staff, including the most recently provision included in Public Law 2009, chapter 372. The subcommittee agreed that they preferred the language used in Public Law 2009, chapter 372 and asked staff to compare that provision to others in existing law and bring back draft language for review at the next meeting that would make all of the provisions consistent with Public Law 2009, chapter 372.

Teacher confidentiality

The subcommittee reviewed Public Law 2009, chapter 331. The enacted law does not reflect the recommended changes made last year by the full Advisory Committee to the Judiciary Committee which proposed to make public certain information related to disciplinary action against school personnel. Staff explained that the Judiciary Committee (and the Education Committee) did not fully consider the Advisory Committee's recommendation. In addition, the Judiciary Committee did not review the Education's Committee's legislation before it was enacted for a few reasons, including timing at the end of the session and because the bill technically did not create a new exception. Linda Pistner agreed that the policy issue put forward by the Advisory Committee was not discussed by the Education Committee or the Legislature and noted that the OPLA staff study of other state laws on teacher confidentiality put Maine among 25% of states that keep this type of information confidential; 50% of states make the disciplinary decision public and 25% of states make the decision and the reasons for the disciplinary action public. Ms. Pistner suggested that the full Advisory Committee consider the issue again. Chris Spruce echoed Ms. Pistner suggestion that the Advisory Committee put the proposal forward again in the next session so the policy of whether certain information related to disciplinary action against school personnel should be made public can be considered. The subcommittee recommended that the draft proposal again be referred to the full Advisory Committee; staff will redraft the language to

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reflect the technical changes needed on account of the enactment of Public Law 2009, chapter 331.

Next Meeting

The subcommittee tentatively scheduled the next meeting for October 13, 2009 at 12:30 pm.

The meeting adjourned at 2:40 p.m.

Prepared by Peggy Reinsch and Colleen McCarthy Reid, Right to Know Advisory Committee staff

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